LIBRARY
SUPREME COURT, U. S.

FILED
SEP 8 1961
JAMES R. BROWNING, Clerk

No. 392

In the

Supreme Court of the United States

OCTOBER TERM, 1961

L. O. BELL,

Petitioner,

v.

F. W. WOOLWORTH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN J. WATTS and TOM SNEED,
P. O. Box 1031,
Odessa, Texas.

ROBERT L. IVY,
Oil and Gas Building,
Fort Worth, Texas,
Attorneys for Petitioner.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

SUBJECT INDEX

	Page
Opinions of the Court Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	2
Statement	3
Reasons For Granting Writ	9
Conclusion	13
Appendix A	15

Page

Erie R. Co. v. Tompkins, 304 U. S. 64 ... 9

Russell v. Todd, 309 U. S. 280 ... 9

Wichita Royalty Co. v. City National Bank, 306 U. S. 103 ... 9

Guaranty Trust Co. v. York, 320 U. S. 99 ... 9

Rules of Decision Act, U. S. C., Section 1652 ... 9

Dawes v. J. C. Penney Co., 236 S. W. d 624 ... 9

S. H. Kress & Company v. Dyer, 49 S. W. 2d 986, writ refused ... 10

Byrd v. Blue Ridge Rural Electric Co-op., 356 U. S. 525; 2 Lawyers Edition 2, 953; 78 Supreme Court 893 ... 11

Smith v. Ruck, 245 Fed. 348 ... 12

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1961

L. O. BELL,

Petitioner,

v.

F. W. WOOLWORTH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. O. Bell, prays that a Writ of Certiorari issue to review the judgment and action of the United States Court of Appeals for the Fifth Circuit, entered on the 7th day of July, 1961. Petition for rehearing was denied on the 25th day of July, 1961.

1.

OPINIONS OF THE COURT BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals is unreported at the date of filing of this petition. Said opinion is attached hereto as Appendix A.

2.

JURISDICTION

Judgment of the Court of Appeals was entered on the 7th day of July, 1961. Jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Appeals may, in rendering judgment in a diversity case, apply substantive law which is directly contrary to the law of the State from which the case was appealed as declared by the Supreme Court of that State?

II.

Whether a Court of Appeals may render judgment denying recovery in a case where the evidence raised issues of fact for the jury and a jury verdict was in favor of the petitioner without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

4.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury

shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Sec. 1652 which reads as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT

This was a diversity of citizenship case which arose from a serious accident occurring in Odessa, Texas, on the 4th day of January, 1958. On that date the petitioner's wife, Altie Bell, was a business invitee in the department store of the respondent, F. W. Woolworth Company, when she slipped on water negligently placed and permitted to remain upon the floor of the store. Mrs. Altie Bell was seriously and permanently injured in her fall to the floor of the store. The case came on for trial on the 12th day of October, 1960, and was tried to a jury and the jury returned a verdict in favor of the plaintiff in the amount of $30,000.00. During said trial plaintiff's wife, Mrs. Altie Bell, testified as follows regarding what it was that she slipped and fell upon:

"Q. You fell flat on your back. Feet slip out from under you?

"A. Yes, sir.

"Q. And did you look around and discover what had caused you to fall there after you had fallen?

"A. Yes, sir.

"Q. And what did you discover there, what did you see there that had caused you to fall?

"A. Water.

"Q. Was that a rather large puddle of water?

"A. Yes, sir, it was.

"Q. *Did it appear to be water like a small amount that would be tracked in, or a large amount like you would get from mopping?*

"A. *It was a large amount.*

"Q. And did you notice areas around you then, other areas (interrupted).

"Mr. Hardie:

"If the Court please, I am going to object to so much leading of the witness.

"The Court:

"Objection will be sustained. Counsel do not lead the witness.

"Mr. Watts:

"Q. Outside of this big puddle of water that you fell in, *did you see anything else around?*

"A. Yes, sir.

"Q. What else did you see?

"A. *I saw some more water.*

"Q. All right. *And what happened there after you had fallen on the floor?*

"A. *They mopped it up.*

"Q. They mopped it up?

"A. Yes, sir.

"Mr. Hardie:

"Your Honor, does my same objection go forward as to what happened after this accident?

"The Court:

"Yes. Let the record reflect that the Court understands that the objection that has heretofore been made by counsel is made to all this line of testimony without the necessity of him making a specific objection. Objection overruled. All right.

"Mr. Watts:

"Q. When you say they mopped it up, who mopped it up?

"A. *One of the janitors.*

"Q. Did you see that man near you, near the place where you had fallen?

"A. *He wasn't very far from me.*

"Q. *And what was he doing after you had fallen there?*

"A. He was mopping when I fell.

"Q. And did the store manager over here, come over there to you?

"A. Yes, sir.

"Q. And what instructions did he give this janitor?

"A. *He told him to mop it all up, and get it in the vestibule too.*

"Q. All right. Told him to mop it all up and get it in the vestibule too, is that right?

"A. Yes, sir.

"Q. And how far was this man with the mop from you when you fell?

"A. *About five feet.*" (R. 36 to 37.)

In addition to Mrs. Bell's testimony, the testimony of a store employee, one Mrs. Watkins, was received as follows:

"Q. *How long had it been raining before the accident?*

"A. *Well, I think it had been raining all day.*

"Q. *Do you or did you at that time have rubber mats at the front of the store for people to dry their feet on as they came in?*

"A. *I don't believe so.*

"Q. *You didn't have them there did you?*

"A. *No, sir.*

"Q. *And do you know that people when they come will track mud and water into a store where it has been raining all day, and they cause it to become slicky and dangerous and you have to go around and mop up those places from time to time on a day where it has been raining all day and where it is slushy, don't you?*

"A. Yes, sir.

"Q. And do you know that if you had rubber mats out there in front that people would dry their feet on them, that that would have helped to make *those floors safer* for people to use them don't you?

"A. Yes, sir.

"Q. And you all didn't have anybody out there requesting anyone to dry their feet or be careful, *or you didn't give them any opportunity to get that mud and slush off their feet before bringing into that store, did you?*

"A. We didn't have anyone out there. No, sir.

"Q. And whenever you get stuff like that on your feet, you just don't leave it in the doorway, but you track it all over the store don't you, after it has been raining and slushy all day long?

"A. Well, I imagine you would.

"Q. And you have people out there, whenever conditions are like this, that have to get out and mop from time to time to try to clean up those conditions, and to try to keep the floor clear, don't you?

"A. Yes, sir." (R. pp. 78-79.)

Mr. Wagner, the manager of the store testified as follows:

"A. He had been instructed to wipe up the water as it accumulated at the door. Well, he had a mop bucket with a wringer on it, so that he could dry out the mop.

"Q. Was he doing that on that day?

"A. He had been doing it, yes, sir.

"Q. Do you recall whether or not the store was crowded at the time?

"A. It was the Saturday after Christmas, it wasn't a very crowded day, no, sir.

"Q. Do you recall seeing a puddle of water this size anywhere on the floor around where Mrs. Bell was sitting or where she had fallen?

"A. *There was some water by the door, a sizeable portion.*

"Q. *How far from where she was?*

"A. *Approximately fifteen feet.*

"Q. *Was that near the entrance?*

"A. *Right at the door.*" (R. pp. 86-87.)

* * * * *

"Q. Didn't you testify in response to questions asked you by Mr. Hardie that that fellow Summers had been mopping up that floor all during the day because as Mrs. Watkins said it had been *raining all day and was a very slushy day?*

"A. I had asked him to mop the floor *periodically throughout the day.*

"Q. Well didn't you tell a while ago that he had *been doing that on this particular day?*

"A. Yes, sir.

"Q. And that is still true isn't it? Now did you tell him a while ago that you told him just to mop the floor in the front of the doorway?

"A. That was the only place where water was being carried in.

"Q. Now that is the only place you told him to mop is that right?

"A. *Well he was instructed to mop water wherever it was. When they spill something or something of that nature it was to be picked up. That is understood.*" (R. pp. 90-91.)

In spite of and in the face of such evidence showing clearly that the floor had been made excessively wet where Mrs. Bell fell and that a man who was right there in that vicinity failed to wipe it up and that water had been in the store throughout the day and that rubber mats should have been used or other precautions should have been taken, the Court of Appeals for the Fifth Circuit rendered their opinion holding that there was no evidence to support a jury verdict, the jury having returned a verdict in the amount of $30,000.00, and such verdict was reversed and rendered, the Court of Appeals holding that the petitioner should take nothing. Such judgment of the Court of Appeals was entered on the 7th day of July, 1961. Motion for rehearing was duly filed on behalf of petitioner and was overruled on the 25th day of July, 1961.

6.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas. The holding of the Court of Appeals complained of is in direct conflict with the applicable decisions of the Texas courts, including the Texas Supreme Court. Since the Court of Appeals failed to follow the clearly established law of Texas a typical situation is presented in which This Honorable Court has granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Wichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99;

See also *Rules of Decision Act, U. S. C., Section 1652.*

In *Dawes v. J. C. Penney Co., 236 S. W. 2d 624*, by the Supreme Court of Texas, we find an action by the plaintiff's wife to recover for injuries that were sustained when she *slipped on mud and water on a smooth terrazo entranceway to the defendant's store.* Evidence showed that the defendant had in its possession *rubber mats* which could be placed on the entranceway but that they had not been placed there at the time of the accident. Further, that the defendant knew that the floor became slippery when it rained; that other persons had slipped upon the slippery floor prior to the plaintiff's accident. The plaintiff testified

she knew that it was slippery, but that she did not realize it was as slippery as it actually was when she fell. The Trial Court held for the defendant and granted an instructed verdict. The Appellate Court ruled that the Trial Court erred in withdrawing the case from the jury; that the evidence was sufficient to uphold a finding of negligence on the part of the defendant; that the defendant had a duty to maintain the premises in a safe condition and that the plaintiff was not guilty of contributory negligence.

Another leading Texas case is that of *S. H. Kress & Company v. Dyer, 49 S. W. 2d 986, writ refused.* In this case by the Waco Court of Civil Appeals, the plaintiff, Mrs. Dyer, had slipped and fallen upon the floor of the defendant's store. The evidence showed that applications of oil had been made periodically to the floor and that the floor at the time of the accident, and for some time prior thereto, was well oiled and rendered slick and slippery. The Court in holding such evidence to be sufficient to sustain a jury verdict in favor of the plaintiff stated as follows:

> "Appellant owed Mrs. Dyer, a customer in its store, upon implied invitation to inspect and purchase its wares, the duty to maintain the floor thereof in a reasonably safe condition for walking to and fro thereon. Any dangerous condition of such floor arising from the manner in which it was maintained by appellant or its employees to whom such maintenance was entrusted, was a breach by it of such duty."

We therefore respectfully submit that the petitioner sustained the allegations of negligence wherein he alleged that the respondent's agents placed an excessive amount of water on the floor when they were mopping and in failing to dry

the floor prior to allowing the petitioner's wife to walk upon it and in failing to warn petitioner's wife that the floor was in a particularly dangerous condition when they knew or ought to have known from the evidence heretofore set out in the statement that such was true. The evidence heretofore set out in the statement clearly shows that the respondent's agents knew of the presence of water upon the floor; knew that the presence of such water upon the floor would make the floor slippery and dangerous; knew that upon a rainy day such as the one involved, rubber mats or other devices should have been placed to prevent water from being tracked in; knew that there was water at the very place where the petitioner's wife fell, as shown by the presence of an employee in the immediate vicinity and, yet, knowing these things, failed to take the proper precautions. The jury, having heard the evidence, determined that the respondent's agents were negligent, and we respectfully submit that such jury verdict should not be set aside and held for naught.

2. The action of the Court of Appeals deprived petitioner of his right to trial by jury, contrary to the Seventh Amendment of the United States' Constitution. This Honorable Court has recently re-affirmed its position with regard to the sanctity of the right to trial by jury in the case of *Byrd v. Blue Ridge Rural Electric Co-op., 356 U. S. 525; 2 Lawyers Edition 2, 953; 78 Supreme Court 893.* This was a case involving personal injuries sustained by the plaintiff in South Carolina when he was engaged in work constructing an electric company substation. Defendant claimed as a

defense that the plaintiff was a statutory employee and, therefore, that the defendant was protected by the workmen's compensation statutes. The District Court granted plaintiff's Motion to strike the defense and a jury verdict in favor of the plaintiff was rendered upon trial. The Court of Appeals directed an entry of judgment for the electric company and on Certiorari This Honorable Court reversed the judgment of the Court of Appeals and, at page 537, This Honorable Court stated through Justice Brennan as follows:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction, and an essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence, if not the command of the Seventh Amendment, assigns the decision of disputed questions of fact to the jury."

Thus, it seems that as recently as 1958, This Honorable Court has seen fit to grant a Writ of Certiorari and reverse a case where the right of trial by jury was involved.

The United States Court of Appeals for the 9th Circuit, in *Smith v. Ruck, 245 Fed. 348*, stated:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail."

Professor Leon Green of the University of Texas, in June of 1957 wrote an article for the Texas Law Review

entitled "Protection of Jury Trial in Diversity cases", in which the following was said about the action of This Honorable Court. At page 770, Professor Green stated:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F. E. L. A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right.
>
> "Citing Dice v. Akron C. & Y. R.R., 342 U. S. 358, and Brown v. Western Ry. Co., 338 U. S. 294."

CONCLUSION

For the foregoing reasons, we respectfully submit that This Honorable Court should grant this petition for Writ of Certiorari to the end that on review the Court of Appeals may be directed to reverse its judgment.

Respectfully submitted,

JOHN J. WATTS and TOM SNEED,
P. O. Box 1031,
Odessa, Texas.

ROBERT L. IVY,
Oil and Gas Building,
Fort Worth, Texas,

By Robert L. Ivy
Attorneys for Petitioner.

A separate Certificate of Service as required will be furnished by counsel.

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18744

F. W. WOOLWORTH COMPANY,

Appellant,

versus

L. O. BELL,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(July 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: Plaintiff-appellee, the husband of the injured party, brought this action in the District Court for the Western District of Texas, Pecos Division, for the personal injuries allegedly suffered as a result of Mrs. Bell's falling in a store owned and operated by appel-

lant. A motion for a directed verdict for the defendant[1] was denied and the case was allowed to be considered by the jury. A judgment was awarded appellee in the amount of $30,000.00. From the entry of that judgment the appellant brings this appeal.

The facts may be briefly summarized. Mrs. Bell, the plaintiff's wife, testified that on January 5, 1958, she entered appellant's store for the purpose of purchasing a cup of coffee. It had been raining and the streets were quite wet. After entering the store, she walked about half way to the coffee counter, then slipped and fell. She testified that after her fall she noticed a puddle of water where she fell and some other water nearby being mopped up by a porter. Other witnesses, the employees of the store, testified that the floor was completely dry at the point of her fall.

It is well established by the Courts of Texas that "when injury is caused by a foreign substance upon a floor which

---

[1]The motion, so far as here relevant, was based on the grounds:

3.

The evidence of probative force wholly fails to show that this defendant had knowledge of the presence of any foreign substance or debris or water on the floor of its Odessa store near the place where plaintiff fell. There is no evidence of probative force to show how long the foreign substance or water had been on the floor of the defendant's store, or that in the exercise of ordinary care this defendant should have known of the presence of such matter on its floor.

4.

The whole of plaintiff's evidence in this case fails to show that the object on its floor was placed there by this defendant or that whatever substance was on the floor was placed there by this defendant or that the presence of such matter on its floor should have been known to defendants, or that such matter had been there for such a time as that in the exercise of ordinary care defendant should have discovered the presence of such foreign matter or water or debris on its floor. The whole of the burden of proof here is upon the plaintiff to show the presence of such danger and that this defendant knew or should have known thereof, and that this defendant was negligent in maintaining its presence in such a condition. There has been a complete failure of proof to show such pertinent facts required.

rendered it slippery or unsafe for use" the party asserting the liability of the owner of the premises must establish:

> "1. That the defendant put the foreign substance upon the floor, or
>
> 2. That the defendant knew the foreign substance was on the floor and wilfully or negligently failed to remove it, or
>
> 3. That the foreign substance had been upon the floor for such a period of time that it would have been discovered and removed by the defendant, had the defendant exercised ordinary care." *H. E. Butt Grocery Co. v. Johnson*, 226; S.W. 2d 501, at 502; see also *Beard v. Henke & Pillot, Inc.*, 314 S.W. 844, at 845, *O'Neal v. J. Weingarten, Inc.*, 328 S.W. 2d 793, at 794.

Upon a careful reading of the testimony offered during the course of the trial, we are forced to the conclusion that the appellee totally failed to introduce evidence which might satisfy the requirements of the Texas rule which we have set out above. There was no proof of any kind that the management knew of the presence of the water; nor was there any proof showing how long the water had been on the floor. Having failed to meet that burden placed upon him, it must follow that the appellee was not entitled to recover for the injuries suffered by his wife and that the trial court erred in refusing to grant the appellant's motion for an instructed verdict.

Accordingly the judgment entered by the District Court must be REVERSED and the cause REMANDED for the entry of a judgment for the defendant.